Chiew Ah Peng (t/a Hard Rock Cafe) v Malayan Breweries (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-736-91
SYED AHMAD IDID J
28 FEBRUARY 1996

Civil Procedure *— Execution — Wrongful attachment — Claim for damages for alleged wrongful attachment — Whether bailiff was correct in execution of writ of seizure and sale — Whether loss arising for alleged wrongful attachment proved*

Malayan Breweries ('the defendant') had sued Hard Rock Cafe and Sunnymac Sdn Bhd ('Sunnymac'), both inter-related businesses of the plaintiff, in an earlier action for the cost of goods sold and delivered to Hard Rock Cafe payment for which was guaranteed by Sunnymac. The defendant obtained judgment and proceeded with execution for the sum owed amounting to RM9,337.78. The defendant obtained a writ of seizure and sale and proceeded against Sunnymac's premises at No 47A. Hard Rock Cafe operated at No 47, ie on the ground floor of No 47A. The plaintiff claimed against the defendant for damages for, inter alia, loss of reputation and profits as well as capital invested in Hard Rock Cafe, resulting from the defendant having taken execution proceedings and attached the plaintiff's properties at premises No 47A.

Held, dismissing the claim:

As there was no evidence as to whether Hard Rock Lounge was licensed to operate at No 47A and No 49A when all the legal documents merely confined Hard Rock to the premises at No 47 and No 49, the bailiff had taken the proper action when he seized the items which he considered as Sunnymac's property at No 47A in accordance with the writ of seizure and sale. The bailiff was not told who else occupied No 47A. As far as the bailiff was concerned, he did not touch any item belonging to Hard Rock Cafe. On the totality of the evidence, the plaintiff had not proved the loss for which he claimed (see p 648E, I).

Per curiam:

While the courts are open for the determination of rights and liabilities, it takes a good lawyer to advise clients, in some cases, not to proceed, as otherwise they would be faulted through costs. It is never a wise decision to take anybody to court merely on 'anger' or just because someone is distressed except where the law clearly supports such actions (see p 649B).

[Bahasa Malaysia summary
Dalam suatu tindakan yang lebih awal, Malayan Breweries ('defendan') telah mendakwa Hard Rock Cafe dan Sunnymac Sdn

Bhd ('Sunnymac'), kedua-dua perniagaan berkait kepunyaan plaintif, untuk kos barang-barang yang dijual dan dihantar-serah kepada Hard Rock Cafe dengan bayaran digerenti oleh Sunnymac. Defendan mendapat penghakiman dan seterusnya mengambil tindakan pelaksanaan untuk jumlah wang yang dihutang kepadanya sebanyak RM9,337.78. Defendan telah mendapatkan satu writ penyitaan dan jualan dan melaksanakannya di tempat perniagaan Sunnymac di No 47A. Hard Rock Cafe berniaga di No 47, iaitu tingkat bawah No 47A. Plaintif menuntut terhadap defendan untuk ganti rugi untuk, antara lainnya, kehilangan nama baik dan keuntungan bersama modal yang dilaburkan di dalam Hard Rock Cafe yang diakibatkan oleh defendan mengambil prosiding pelaksanaan dan menyita barangan plaintif di No 47A.

Diputuskan, menolak tuntutan itu:

Oleh kerana tidak terdapat sebarang keterangan yang menunjukkan sama ada Hard Rock Lounge dilesenkan untuk beroperasi di No 47A dan No 49A walhal kesemua dokumen menunjukkan bahawa Hard Rock hanya beroperasi di No 47 dan No 49, bailif telah bertindak secara betul apabila beliau menyita barang-barang yang dianggapnya sebagai barangan Sunnymac di No 47A menurut writ penyitaan dan jualan. Bailiff tidak diberitahu siapa lagi yang menduduki No 47A. Setakat mana yang bailif tahu, beliau tidak menyentuh apa-apa barangan kepunyaan Hard Rock Cafe. Atas keseluruhan keterangan, plaintif telah gagal membuktikan kehilangan yang untuknya beliau membuat tuntutan (lihat ms 648E, I).

Per curiam:

Walaupun mahkamah bertanggung jawab untuk memutuskan hak dan liabiliti, peguam yang baik perlu menasihati anak guamannya, di dalam kes-kes tertentu, supaya memberhentikan tindakannya, kerana jika tidak mereka akan dikehendaki membayar kos. Adalah bukan satu tindakan yang wajar menyaman seseorang ke mahkamah demi kemarahan atau cuma kerana seseorang telah disusahkan kecuali di mana terdapat sokongan undang-undang yang jelas untuk tindakan sedemikian (lihat ms 649B).]

Notes

For a case on wrongful attachment during execution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1404.

Legislation referred to

Evidence Act 1950 s 101

S Selvanathan (*Thevin Chandran & Wong*) for the plaintiff.
Anand Ponnudurai (assisted by *Koh Yew Chong*) (*Gurbakhash & Tan*) for the defendant.

Cur Adv Vult

Syed Ahmad Idid J: The plaintiff, who managed a 'Hard Rock Cafe' in Taman Tun Dr Ismail ('TTDI'), claimed against the defendant for damages for loss of reputation and profits, capital invested in the cafe as well as for interest at 8% as from 10 April 1987 and costs.

The loss was said to have come about as a result of the defendant having taken execution proceedings and attached the plaintiff's properties at premises No 47A.

From the bundle of agreed documents, it is clear that the plaintiff had taken court action against the defendant in 1988 vide 23–1306–88 but this was dismissed on 28 June 1988. This followed the defendant's action against the Hard Rock Cafe and Sunnymac Sdn Bhd vide 82–16437–86 of 21 October 1986 for RM9,337.78 being costs of goods sold and delivered.

Mr Selvanathan, counsel for the plaintiff, informed the court that 'what distressed them (the plaintiff and his brother) is that on a meagre sum of RM9,337.78 summons was filed and execution followed'.

At the trial, the plaintiff and his brother Gary Chew Teow Aun testified while the defendant produced Mr Gurbakhash Singh and Miss Kwong Poh Yoke who is the credit controller of the defendant's company.

Facts

The plaintiff traded with the defendant from the time his business, Hard Rock Cafe, started. The defendant provided the plaintiff with 90 barrels of draft beer as seen from the trade offer credit notes and draft beer sales invoices. I am satisfied that these were all accounted for and taken into account because:

(i) the offer was accepted in 1984 whereas the problem such as we have to deal with today occurred in 1986;

(ii) the statements of account explain the running transactions and show that the 90 barrels were all accounted for. So there is nothing more that the plaintiff can rely on in this respect.

The plaintiff (and his Hard Rock Cafe) registered their business at No 47 and No 49 Jalan Tun Mohd Fuad 3, TTDI as 'Pub and Bar' and the owner was stated to be Chiew Ah Peng. Sunnymac Sdn Bhd's office was said to be at No 47A on the same road. It must be explained that the premises with 'A' are those on the first floor, and therefore above the ground floor and are separate.

On 21 October 1986, Malayan Breweries (or the defendant today) took out a summons in the Kuala Lumpur magistrates' court claiming RM9,337.78 against both:

(i) Hard Rock Cafe and

(ii) Sunnymac Sdn Bhd.

In that case Hard Rock Cafe was said to have received goods from Malayan Breweries and Sunnymac had guaranteed the due payment of all sums. In spite of repeated demands, Hard Rock Cafe and Sunnymac 'failed to settle the sums' and judgment was given on 19 January 1987. The evidence was clear that the plaintiff and his brother Gary, who was

then Sunnymac's Director, consented to that judgment. It is useful to add that Gary was running the Hard Rock Cafe on behalf of the plaintiff and the plaintiff admitted in court that for any details of the business, 'ask Gary'. The plaintiff in court took the stand that he was merely an investor and did not really know the ins and outs of what occurred.

Gary ('PW2') informed the court that he consented to the judgment in the magistrates' court but this was on the understanding (or more like misunderstanding) that the judgment sum could be paid by instalments. Up to today that judgment remains good and effective.

But as Hard Rock Cafe and Sunnymac did not comply with the magistrates order, Malayan Breweries filed a request for a writ of execution on 28 March 1987 and a writ of seizure and sale was issued thereafter against the 'second defendant Sunnymac Sdn Bhd at No 47A' and accordingly a public auction proclamation was made. 20 items were seized but 14 were claimed by Onward Leasing & Credit Sdn Bhd, three by Tong Woh Medical Hall, one by Carlsberg Brewery and two by Eden Farm & Nursery. The 14 items were released to the leasing company by the seizing officials whereas the other parties took interpleader actions where the court only allowed the release of one item to Carlsberg.

The attachment/seizure

It is useful to view the day and venue of the seizure. The venue was undoubtedly at No 47A, the office of Sunnymac. When the bailiff entered the premises with a representative from the firm of Messrs Gurbakhash & Tan, Gary ('PW2'), was present. He did not tell the bailiff who else occupied No 47A. So the seizing party took possession of those items which they considered as Sunnymac's property, of which 14 were on lease to Sunnymac. As far as they were concerned they did not touch any item belonging to Hard Rock Cafe. On record it must be remembered that Hard Rock Cafe was on the ground floor and was a distinct entity. Gary also added that ' No 47A was mostly occupied by Sunnymac.'

The evidence also showed that when The Search (a band) and Sarah Loo (a singer) left the Hard Rock Cafe, the plaintiff's business fell and income decreased to a loss. Evidence as to the 'loss', if any, was scanty and unacceptable. But even if there was a loss, this could not be from any action taken by the defendant or the bailiff. For business reasons, the plaintiff converted the Hard Rock Cafe to a coffee shop.

There was no evidence whether:

(a) the name 'Hard Rock' was authorized by the Hard Rock Company; or

(b) Hard Rock Lounge was licensed to operate at No 47A and No 49A when all the legal documents merely confined Hard Rock to premises No 47 and No 49.

I am therefore able to find that the bailiff had taken the proper action when he seized the items at No 47A in accordance with the writ of seizure and sale.

A The problem arose when one man (in this case Gary) ran a cafe and lounge and also acted as director of another business, Sunnymac, in the same premises and, with nonchalance, dealt with both interchangeably.

While the courts are open for the determination of rights and liabilities, it takes a good lawyer/counsel to advise clients, in some cases, not to B proceed as otherwise they would be faulted through costs. It is never a wise decision to take anybody to court merely on 'anger' or just because someone is distressed except where the law clearly supports such actions. It is sad that the misunderstanding over the so-called instalment plan for the plaintiff to pay RM500 per month has dragged him till the conclusion of this case from 1986, about ten years since.

C He who asserts must prove (s 101 of the Evidence Act 1950). Upon the totality of the evidence in court as well as from the documents, this court is unable to accept that the plaintiff has made out his case against the defendant and so dismisses the claims and the writ of summons with costs to defendant.

D *Claim dismissed.*

Reported by Ng Kian Pin

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